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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems	)	WT Docket No. 96-18
	)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding	)	PP Docket No. 93-253

To: The Commission, *en banc.*

REPLY TO OPPOSITION

AIRSTAR PAGING, INC. ("AirStar"), by its attorney, hereby respectfully replies to the opposition pleading filed in the captioned proceeding by Nationwide Paging, Inc. ("NPI") under date of May 9, 1997.[1] NPI predictably opposes AirStar's petition for reconsideration or clarification of the *Second Report and Order*[2] herein to the extent the petition challenges the Commission's attempt to dismiss all "pending finders' preference

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[1] Nationwide Paging Partial Opposition to Petitions for Reconsideration, WT Docket No. 96-18, May 9, 1997 (hereinafter cited as the "Opposition" or "Opp."). For the record, AirStar notes that although NPI certified that it served a copy of its opposition by mail on counsel for AirStar, no such copy has ever been received by AirStar or its counsel.

[2] *Second Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 96-18, FCC 97-59, adopted February 19, 1997 and released February 24, 1997, 62 Fed. Reg. 11616 (March 12, 1997) (the "*SR&O*").

requests" without action. (*SR&O* at ¶18).[3] AirStar respectfully submits that NPI's opposition is wholly without merit and should be rejected, and that AirStar's request for clarification and/or reconsideration should be granted in all respects.

In reply to NPI, AirStar respectfully shows:

As a prefatory matter, AirStar points out that much of NPI's argument is misplaced in any event because it is directed to the question of whether or not AirStar's finder's preference request appropriately can be deemed still "pending" for purposes of the Commission's ruling in the *SR&O*. The argument is pointless because AirStar expressly acknowledged that the issue plausibly can be argued either way; and it requested the necessary clarification or modification of the ruling *regardless* of what the Commission originally intended to do in the *SR&O*.

With respect to the merits of AirStar's petition on this issue, NPI summarily argues (1) that the Commission gave adequate notice of its intended ruling in ¶22 of the *Notice of Proposed Rulemaking* (Opp. at p. 3), and (2), relying solely on *Hispanic Inf. & Telecommunications Network v. FCC*, 865 F.2d 1289 (D.C.Cir.

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[3] NPI is the target licensee in a finder's preference request for 929.0125 MHZ in southern California filed by AirStar (f/k/a J & M Paging, Inc.) on January 30, 1996. *In the matter of Nationwide Paging, Inc.*, Case No. 96F191 (filed January 30, 1996). The requested preference was granted by the Commission on December 19, 1996, but NPI subsequently exercised its appeal rights on January 21, 1997.

1989), that the Commission has "ample authority" to dismiss pending finder's preference requests, "so long as it provides adequate notice of the proposed rule changes and opportunities for comment". (*Id.*). As AirStar shows below, NPI is simply wrong on both counts.

First of all, it is absolutely not true that the Commission gave notice in the *NPRM* that it intended to dismiss *pending* finder's preference requests without action. As AirStar noted in its petition, the Commission's *entire* discussion of this issue in the *NPRM* consisted of one terse sentence stating that "[t]o the extent we adopt geographic licensing, we propose to eliminate the finder's preference." (*NPRM* at ¶22). Since rules are by definition *prospective* in their effect,[4] this solitary terse statement in the *NPRM* plainly did not give notice -- contrary to NPI's claim -- that *pending* finder's preference requests might be dismissed without action.[5]

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[4] 5 U.S.C. §551(4)("rule" defined in relevant part as "agency statement of general or particular applicability *and future effect* ....")). (Emphasis added).

[5] The lack of notice given by the *NPRM* is underscored by contrast with the Commission's discussion in WT Docket No. 96-199, in which the Commission at least arguably suggested in an NPRM that it might dismiss then-pending finder's preference requests as a result of its decision in that proceeding. *Notice of Proposed Rulemaking,* WT Docket No. 96-199, 11 FCC Rcd 13016, 13021 & ¶11 (FCC 1996).

Moreover, *Hispanic Inf. & Telecommunications Network, supra,* is readily distinguishable on its facts and does not support the Commission's retroactive abrogation of its finder's preference program. In actual fact, the appropriate analogy here is to *McElroy Electronics Corporation v. FCC,* 86 F.3d 248 (D.C.Cir. 1996), upon which NPI otherwise forcefully relies to argue that dismissal of pending mutually exclusive paging applications is unlawfully retroactive.[6]

The analogy to both the *McElroy* and the pending paging applications is especially apt because the Commission expressly established a *one day* "cut-off" for finder's preference requests.[7] Thus, NPI simply cannot have it both ways: for the same reasons it argues that the dismissal of pending mutually exclusive paging applications is unlawful, so too is the dismissal of pending, non-mutually exclusive finder's preference requests.

Furthermore, as AirStar pointed out in its petition, the very *least* the Commission is lawfully required to do -- which it made absolutely no attempt whatsoever to do -- is to justify the need for retroactive application of the rule under the standards

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[6] Nationwide Paging, Inc. Petition for Partial Reconsideration and Clarification, WT Docket No. 96-18, April 11, 1997, at pp. 6-10.

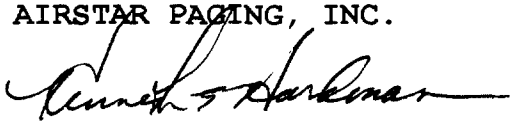
[7] *Report and Order,* PR Docket No. 90-481, 6 FCC Rcd 7297, 7307 at ¶62, 7308 at ¶¶69-72 (FCC 1991).

of *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947), and its progeny.[8] NPI does not challenge this argument and thus must be deemed to have conceded it.

In short, NPI's opposition is meritless on all counts. In fact, contrary to NPI's claim, the Commission did *not* give notice that it would dismiss pending finder's preference requests. Therefore, the express condition set forth in *Hispanic Inf. & Telecommunications Network, supra,* is unsatisfied, even if that case were otherwise applicable here (which it is not). Moreover, *Hispanic Inf. & Telecommunications Network, supra,* is readily distinguishable on its facts and does not apply in this case at all. Rather, for the same reasons the Commission was lawfully required to process pending mutually exclusive applications in *McElroy,* it likewise is lawfully required to process pending non-mutually exclusive finder's preference requests to their conclusion.

Respectfully submitted,

AIRSTAR PAGING, INC.



By: Kenneth E. Hardman

Its Attorney

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[8] *E.g., Retail, Wholesale & Dep't Store Union v. NLRB,* 466 F.2d 380, 389-90 (D.C.Cir. 1972); *Yakima Valley Cablevision, Inc. v. FCC,* 794 F.2d 737, 745-46 (D.C.Cir. 1986); *Maxcell Telecom Plus, Inc. v. FCC,* 815 F.2d 1551, 1554-55 (D.C.Cir. 1987).

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May 22, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have this 22nd day of May, 1997, served the foregoing Reply to Opposition upon Nationwide Paging, Inc. by mailing a true copy thereof, first class postage prepaid, to Samuel S. Guzik, Esquire, Guzik & Associates, 1800 Century Park East, Fifth Floor, Los Angeles, CA 90067-1501.

Kenneth E. Hardman